No. 69
(Consolidated with No. 71)

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF RAILROAD TRAINMEN, ORDER OF RAILROAD CONDUCTORS AND BRAKEMEN, and SWITCHMEN'S UNION OF NORTH AMERICA ..... *Appellants*

*v.*

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and THE TEXAS AND PACIFIC RAILWAY COMPANY ..... *Appellees*

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF ARKANSAS

## BRIEF FOR THE APPELLANTS

JAMES E. YOUNGDAHL
711 West Third Street
Little Rock, Arkansas 72201
*Attorney for the Appellants*

*Of Counsel:*
EUGENE F. MOONEY
McMATH, LEATHERMAN, WOODS & YOUNGDAHL
711 West Third Street
Little Rock, Arkansas 72201

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## BRIEF FOR THE APPELLANTS

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## OPINIONS BELOW

**The majority and minority opinions of the District Court for the Western District of Arkansas (R. 227-83) are reported at 239 F. Supp. 1.**

## JURISDICTION

The judgment of the District Court was entered on March 8, 1965. R. 284-85. Notice of Appeal was filed on March 17, 1965. R. 287-89. A Jurisdictional Statement was filed on April 12, 1965. Probable jurisdiction was noted on June 7, 1965; the appeal was consolidated with No. 71, in which the Jurisdictional Statement had been filed on April 15, 1965. R. 296. The jurisdiction of the Supreme Court to review the decision on direct appeal is conferred by 28 U.S.C. § 1253.

## STATUTES INVOLVED

ARK. STAT. ANN. §§ 73-720 through 722, 73-726 through 729 (Repl. Vol. 1957), and Public Law 88-108, 77 STAT. 132, 45 U.S.C. following § 157 (1964), are set forth as Appendix A and B hereto.

## STATEMENT

The statutes challenged in this case were passed by the General Assembly of Arkansas to delineate minimum train crews for certain conditions of railroad operation in the state.

ARK. STAT. ANN. §§ 73-720 through 722 (1947) require a minimum crew of an engineer, a fireman, a conductor and three brakemen for freight trains, except for small companies and short trains. ARK. STAT. ANN. §§ 73-726 through 729 (1947) require a minimum crew of an engineer, a fireman, a foreman and three helpers for switch trains operating in large communities, except for small companies.

Six large interstate railroad companies brought this action before a three-judge court in the Western District of Arkansas on April 10, 1964. R. 1-24. Their complaint sought an injunction against enforcement of the statutes applicable to freight and switch crews, as violative of the Fourteenth Amendment and the commerce and supremacy clauses of the United States Constitution.

The complaint conceded that the Arkansas statutes have been upheld in the past against similar contentions, but alleged that changes in operating conditions and expanded federal occupation of the field make prior holdings inapposite. R. 6-14. The primary basis for the latter argument was the 1963 passage of Public Law 88-108, 77 STAT. 132, 45 U.S.C. following § 157 (1964). R. 19. Public Law 88-108, enacted to prevent disruption of essential national transportation services over a dispute which had not been susceptible of settlement through extant mediation procedures, established an arbitration procedure to resolve two specific issues involving work rules for certain railroads.

Intervention was granted to five operating brotherhoods, unions which represent several thousand employees of the plaintiff railroads in Arkansas. R. 24-27. The broth-

erhoods and the Attorney General of Arkansas denied all vital allegations of the complaint, and alleged that the challenged statutes protect the public safety in a manner within the power of the state to effectuate. R. 28-39. Discovery proceedings were suspended upon the filing by the railroads of a motion for summary judgment based upon supremacy clause, commerce clause and equal protection issues. R. 40-41. The supremacy clause contention was found sufficient, two of the three judges holding that the Arkansas statutes are "in substantial conflict with Public Law 88-108 . . . and the proceedings thereunder, and are therefore unenforceable." R. 278. The third judge dissented, relying on "prior specific findings in the earlier cases . . . and the favored position given by the Supreme Court to state safety statutes." R. 283. Judgment enjoined enforcement of the challenged measures. R. 284-85.

On March 27, 1965, Mr. Justice Byron R. White stayed the injunction pending disposition of the case by this Court. R. 294-95. Appeals were perfected by the brotherhoods and the State of Arkansas; they were consolidated on June 7, 1965, in an order noting probable jurisdiction. R. 296.

## SUMMARY OF ARGUMENT

*The Arkansas full crew statutes have been validated consistently as proper exercises of state power to protect the safety of its citizens.*

This Court has upheld the Arkansas statutes in question against repeated railroad attacks based on varied constitutional contentions, including federal preemption. *E.g., Missouri Pac. R.R.* v. *Norwood,* 283 U.S. 249 (1931). The state legislation again was cited with approval in *Southern Pac. Co.* v. *Arizona,* 325 U.S. 761 (1945).

After failing to repeal the full crew laws by initiated act in 1958, the railroads brought this action on substantially the same grounds as prior cases reaching this Court. Additional argument rests solely on the general expansion of the preemption doctrine and the passage by Congress of Public Law 88-108.

On the record at bar, the full crew laws should continue to be considered as safety statutes. As such, they are exercises of state power permitted by federal labor-management relations legislation. *Terminal R.R.* v. *Brotherhood of Railroad Trainmen,* 318 U.S. 1 (1943).

*Congress has not impaired the enforcement of the Arkansas full crew laws through Public Law 88-108 or any other legislation.*

Judicial evaluation of a preemption contention requires examination of Congressional intent. The primary test is what Congress says, and subsidiary tests of supersession must be resorted to only when Congress does not say what it intends.

The effect of Public Law 88-108 on state full crew laws was considered exhaustively by Congress, and every authoritative expression negated preemption. To be absolutely

sure that no implications of the Interstate Commerce Act could be construed to result in preemption, Congress installed as arbitrators a limited *ad hoc* board, rather than the Interstate Commerce Commission recommended by the President. The members of Congress and the contending parties understood at the time that the federal legislation was not to affect full crew laws.

The arbitration board was faithful to the congressional intention. As to one of the issues before it, it pointed out that the apparent severity of its rulings would be ameliorated by the continued operation of state full crew laws. As to the other, it instructed subsidiary panels to be guided by state railroad legislation.

Even if inferential tests are examined, no suggestion of preemption can be found. The congressional resolution was drafted solely to stop a specific strike. Only two of many pending issues were covered. Only certain parties are affected. The resolution expired 180 days after its enactment, and the ensuing arbitration award two years after it became effective. Congress did not occupy the same field as that of the full crew laws; even if it did, the occupation does not produce a clash from which preemption can be inferred.

The Railway Labor Act and Interstate Commerce Act no more bar the operation of state full crew laws now than they did at the time of *Terminal R.R.* v. *Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943). The reasons for an asserted increase in preemption rulings in other labor relations fields do not apply here.

***Invalidation of Arkansas full crew laws on preemption principles could result only from judicial evaluation of the merits of the work rules dispute, a constitutionally unjustifiable interference with the political and legislative process.***

Even if the railroads are right about the economic undesirability of the full crew laws, recognition of such undesirability and response to the recognition are functions exclusive to the legislature and the people.

Public Law 88-108 arose out of contested political efforts by both sides to an old dispute. Congress was presented with all of the facts and arguments, and deliberately chose to act in a manner which would not interfere with state full crew laws. In doing so, it recognized legitimate values, such as the gradual, not abrupt, elimination of jobs as a result of industrial advances. The people of the states, including Arkansas, also recognize the ways in which competing interests may be served during the process of repeal.

Invalidation of the Arkansas full crew laws here would violate a concept of the judicial function which has been discarded in due process, separation of powers and political question fields. *E.g., Ferguson* v. *Skrupa,* 372 U.S. 726 (1963). The judicial restraint urged here was exercised in another situation arising from technical progress of railroads in *Order of Railroad Telegraphers* v. *Chicago & N.W. Ry.,* 362 U.S. 330 (1960).

The court below applied its ideas of economic policy in concluding that Congress *should* have preempted through Public Law 88-108. This, of course, is not the question. The legislative history leaves no question about what Congress *did.*

## ARGUMENT

### I. The Arkansas Full Crew Statutes Have Been Validated Consistently as Proper Exercises of State Power to Protect the Safety of its Citizens.

#### A.

The two full crew laws[1] in dispute comprise a small portion of Chapter 7 of Title 73 of the Arkansas Statutes, entitled "Equipment of Railroads—Safety Provisions." Ark. Stat. Ann. §§ 73-701 through 744 (Supp. 1963). Arkansas lawmakers have expressed in this chapter their views on a variety of conditions to protect the citizens of the state from the hazards of railroading.

The earliest and most-applied section of the chapter is an 1868 enactment requiring the sounding of a bell or whistle at public crossings. Ark. Stat. Ann. § 73-716 (Repl. Vol. 1957); *Kansas City S. Ry.* v. *Baker,* 233 Ark. 610, 346 S.W.2d 215 (1961). The statutes in dispute were passed in 1907 and 1913. The most recent addition to the chapter, enacted in 1953, requires sanitary drinking cups and pure ice cooled drinking water on locomotives and cabooses. Ark. Stat. Ann. §§ 73-741 through 744 (Supp. 1963). Other portions were changed as recently as 1961. Ark. Stat. Ann. § 73-734 (Repl. Vol. 1957), repealed by Ark. Acts 1961, No. 185. Safety requirements defined by the chapter include candle power of headlights, construction of cabooses, lights on switches, signals at tunnels and first aid kits.

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[1]Any characterization of these statutes risks reflection of partisan vigor intrinsic to a dispute which has raged for over a century. See Weber, *Public Policy and the Scope of Collective Bargaining,* 13 Lab. L. J. 49 (1962). Propriety of the term "full crew laws" has been established by the Arkansas Supreme Court. *Hope* v. *Hall,* 229 Ark. 407, 316 S.W.2d 199 (1958). See also *Southern Pac. Co.* v. *Arizona,* 325 U.S. 761, 779 (1945). In any event, this selection seems preferable to others available, such as "excess crew laws" or "minimum safe crew laws."

Certainly legitimate safety protection may encompass the numbers and skills of employees who man the trains. The Arkansas railroad safety chapter incorporates this maxim in several particulars. In addition to the freight and switch crew standards challenged in the instant case, a companion law establishes a minimum crew for passenger trains.[2]

An organic relationship between the full crew statutes and other safety provisions has been generated by Arkansas lawmakers; an effect of wrenching two from the body of railroad safety law would be mutiliation. See, *e.g.*, ARK. STAT. ANN. § 73-701 (Repl. Vol. 1957) (locomotive cab must be constructed to place engineer and fireman under same roof, which must be at most fourteen feet in length and extend over the entire engine gangway). Doctrines of civil liability have been painstakingly founded on the whole structure of the statutory chapter.[3] See *Harper* v. *Missouri Pac. R.R.*, 229 Ark. 348, 314 S.W.2d 696 (1958); Note, 15 ARK. L. REV. 212, 213 (1961).

B.

From their inception, Arkansas full crew laws have been under persistent attack by railroads to which they apply. Shortly after the passage of the full freight crew act in 1907, a multifarious challenge to its constitutionality reached this Court. *Chicago, R.I. & Pac. Ry.* v. *Arkansas*, 219 U.S. 453 (1911). The statute does not, it was held, unconstitutionally regulate commerce, establish irrelevant classifications or deprive the railroads of property without

[2]The omission of this statute from the attack in this case suggests an eye to public relations, not logic. *Cf. Hope* v. *Hall*, 229 Ark. 407, 316 S.W.2d 199 (1958).

[3]And compare statutes outside of the railroad safety chapter, such as that establishing a duty to keep a proper lookout. ARK. STAT. ANN. § 73-1002 (Supp. 1963); *Overstreet* v. *Missouri Pac. R.R.*, 195 F.Supp. 542 (W.D.Ark. 1961) (personal injury judgment for defendant based on satisfaction of lookout duty established by testimony of members of full crew).

due process of law. Although "Congress, in its discretion, may take entire charge of the whole subject of . . . interstate cars," until it does, state full crew laws prevail. 219 U.S. at 466. "It is not too much to say that the state was under an obligation to establish such regulations as were necessary or reasonable for the *safety* of *all* engaged in business or domiciled within its limits." 219 U.S. at 465.

Undaunted, the railroads launched substantially the same attack on the 1913 Arkansas full switch crew statute. *St. Louis, I.M. & S. Ry.* v. *Arkansas*, 240 U.S. 518 (1916). Again, and more summarily, this Court rejected their constitutional contentions and upheld the legislation.

It was fifteen years before the next invalidation effort. *Missouri Pac. R.R.* v. *Norwood*, 283 U.S. 249 (1931). The railroads contended, as they do in the instant case, that changed operating conditions and new congressional action gave substance to their due process, equal protection, commerce and supremacy clause contentions. Particularly on the preemption point, the railroads argued that following the two previous cases:

> Congress has occupied the field and has delegated to the [Interstate Commerce] Commission and [Railway] Labor Board full authority over the subject and that the state laws under consideration are repugnant to the comprehensive scheme of federal regulation prescribed by the Interstate Commerce Act as amended and conflict with §§ 1(10) and (21), 13, 15 and 15a thereof . . . and with the spirit of the Railway Labor Act of 1926. 283 U.S. at 252-53.

In language that is central to the legislative development of the instant dispute, the Court held: "In the absence of a clearly expressed purpose so to do Congress will not be held to have intended to prevent the exertion

of the police power of the states for the regulation of the number of men to be employed in such crews." 283 U.S. at 256. *Norwood* was returned to this Court on an amended complaint in 1933; the same result was undisturbed. *Missouri Pac. R.R.* v. *Norwood*, 290 U.S. 600 (1933).

The Arkansas full crew law decisions were cited with approval in *Southern Pac. Co.* v. *Arizona*, 325 U.S. 761, 779 (1945); the next phase of the railroad campaign featured a different tactic. In 1958, an act to repeal the three Arkansas full crew laws was initiated for popular vote. *Hope* v. *Hall*, 229 Ark. 407, 316 S.W.2d 199 (1958). The people were no more persuaded by railroad entreaties than had been the legislature and the judiciary; Arkansas voters retained full crews by a margin of 162,748 to 130,465. Initiated Act No. 1 of 1958, Election Files, Arkansas Secretary of State (Nov. 3, 1958).

Now the half-century campaign of the railroads to nullify Arkansas full crew laws again reaches this Court. Evidentiary evaluation of their newest allegations of changed conditions was found unnecessary in the court below, as two judges were convinced that as a matter of law Congress has now so occupied the field as to prevent the operation of the state enactments.

C.

The legislative and judicial history of the Arkansas full crew laws indicates only that they are legitimate exercises of state power to protect the safety[4] of its citizens. A safety characterization is not essential to the position of the brotherhoods. See *Kelly* v. *Washington*, 302 U.S. 1,

[4] "The essence of our suggested procedure is that 'safety' and 'hardship' are merely words except as they take on meaning in actual situations. Safety and hardship are related to time and place; and we know of no way to abstract them from time and place." *Report of Emergency Board No. 154* (May 13, 1963), *Hearings on H.J. Res. 565 (Railroad Work Rules Dispute)*, 88th Cong., 1st Sess. [hereinafter *House Hearings*], 46.

13 (1937). But it is a context of substance, as in the words of the dissenting judge below, this Court has given a "favored position" to "state safety statutes." *Terminal R.R.* v. *Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6-7 (1943): *Local 24* v. *Oliver*, 358 U.S. 283, 297 (1959).

Every significant judicial consideration of full crew laws, including every reference by this Court, has recognized their safety rationale.[5] The Supreme Court of Arkansas described the statutes as "directly affecting the public safety" as recently as 1955. *Chicago, R.I. & Pac. R.R.* v. *State*, 224 Ark. 622, 627, 275 S.W. 2d 646, 649 (1955). See *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U.S. 405, 433 (1935) ("When the scope of the police power is in question the special knowledge of local conditions possessed by the state tribunals may be of great weight."). A recent New York decision, based on weeks of testimony on the intricacies of contemporary railroading, described many dangers to which the safety requisites in dispute rationally may be addressed. *New York Cen. R.R.* v. *Lefkowitz*, 259 N.Y.S. 2d 76 (Sup.Ct. 1965). See also *Chicago & N.W. Ry.* v. *La Follette*, 135 N.W. 2d 269, 278 (Wis. 1965).

Against this judicial backdrop, the indisputable original purpose of full crew laws,[6] and the refusal of the court

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[5]The railroads argue that the arbitration board established by Public Law 88-108 determined conclusively that safety factors do not warrant a crew of the size specified by state full crew statutes. Motion to Affirm, 16-17. Assuming, *arguendo*, such determination by the arbitrators based upon a preponderance of the evidence before them, it cannot be the basis for a judicial assumption that a state legislature acted unwisely any more than any other source of an opinion about the "wisdom, need, or appropriateness of the legislation." See *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963). As to the argument that Congress thereby "entered the field" of railroad safety, see Point II, *infra*.

[6]*Work Rules Controversy in Perspective*, 87 MON. LAB. REV. III (Mar. 1964). There is ample ground for concluding that safety continues to be affected by the makeup of train crews. See, *e.g.*, *Hearings on S.J. Res. 102 (Railroad Work Rules Dispute)*, 88th Cong., 1st Sess. [hereinafter *Senate Hearings*], 492-96, 631-34; *House Hearings*, 711-14, 997-99. The Chairman of the Interstate Commerce Commission pointed out that even railroad

below to take testimony on their relevance to current conditions, the alleged intention of Congress to impair state protection of the safety of its citizens must be evaluated. See *Munn* v. *Illinois*, 94 U.S. 113, 132 (1877).

managers cannot agree among themselves on the crew complement conducive to safe operation. *House Hearings*, 840-41. See also *Statement M-450*, Interstate Commerce Commission, April and August, 1964, which indicates that train accidents and employee casualties increased with the reduction of employment permitted under some circumstances by the arbitration board established pursuant to Public Law 88-108.

## II. Congress Has Not Impaired the Enforcement of the Arkansas Full Crew Laws Through Public Law 88-108 or Any Other Legislation.

### A.

Public Law 88-108, the primary basis of a preemption contention in this case, grew out of a dispute over work rules between certain railroads and brotherhoods. The matter could not be resolved through extant mediation procedures,[7] and the parties were left to economic self-help. *Brotherhood of Locomotive Engineers* v. *Baltimore & O. R.R.*, 372 U.S. 284 (1963).

Because of the judgment of the executive and legislative branches that a widespread railroad strike could not be tolerated in the national interest, Congress enacted Public Law 88-108 to meet "a need for a special, ad hoc legislative remedy to fit the situation confronting the United States because of the hopeless deadlock in the railroad negotiations." 109 Cong. Rec. 15979 (1963). See also 109 Cong. Rec. 15890, 16120 (1963); S. Rep. No. 459, 88th Cong., 1st Sess. [hereinafter S. Rep.], 7 (1963); H.R. Rep. No. 713, 88th Cong., 1st Sess. [hereinafter H.R. Rep.], 13 (1963).

Obviously Congress has the *power* to exercise exclusive control over the field occupied by the Arkansas full crew laws, whether it be characterized as railroad safety or employment practices.

> There is no longer any question that Congress can redefine the areas of local and national pre-

[7] It seems pointless to supplement the countless reviews of the history of the dispute. A concise survey is contained in the *Report to the President on the Railroad Rules Dispute* by a special subcommittee of the President's Advisory Committee on Labor-Management Policy (July 19, 1963). R. 54-58. See also Kaufman, *The Railroad Labor Dispute: A Marathon of Maneuver and Improvisation*, 18 Ind. & Lab. Rel. Rev. 196 (1965).

> dominance . . . despite theoretical inconsistency with the rationale of the Commerce Clause . . . as a limitation in its own right. The words of the Clause—a grant of power—admit of no other result. When Congress enters the field by legislation, we try to discover to what extent it intended to exercise its power of redefinition . . . .

*California* v. *Zook*, 336 U.S. 725, 728 (1949). Congress is not compelled to occupy a whole field; judicial treatment of a supersession contention requires measurement of the occupation. *Kelly* v. *Washington*, 302 U.S. 1, 10 (1933); *Florida Lime Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963).

The best test of what Congress intended is what Congress said. Most cases—the hard cases—in which preemption has been an issue have required intensive inference because Congress has failed to say if it intended its exercise of power to be exclusive. Compare *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), with *City of New York* v. *Miln*, 11 Pet. 102 (1837); *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148 (1942), with *Florida Lime Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963).

The volume of opinion in cases in which congressional intent was difficult to ascertain must not obfuscate the first principle of preemption: subsidiary "tests of supersession" are material only when Congress has not specifically expressed itself. *Pennsylvania* v. *Nelson*, 350 U.S. 497, 501-02 (1956). A search for pervasiveness or repugnancy is necessary when "the statute says nothing expressly on this point and we are aided by no legislative history directly in point." *California* v. *Zook*, 336 U.S. 725, 733 (1949).[8]

[8]Recent development of the preemption doctrine by the judiciary has been especially notable in the application of the National Labor Relations Act and its amendments. 29 U.S.C. §§ 141-87 (1964). Because Congress refrained from saying how much it left to the states, the courts have been forced to evaluate "conflicting indications of congressional will." *Garner* v. *Teamsters Union*, 346 U.S. 485, 488 (1953). The problem has been com-

Only when Congress does not say what it intends, a presumption that it acted reasonably shows intent to preempt when concurrent state action would be unreasonable.

B.

The intention of Congress in the enactment of Public Law 88-108 was direct and express.

The potential effect of Public Law 88-108 on the enforcement of state full crew laws was considered exhaustively in House and Senate committee hearings and on the House floor. Every federal official to address himself to the subject expressed the intention and understanding that the enactment should not or would not affect state full crew regulations. Representative samples[9] include the following unmistakable sentiments:

> SECRETARY WIRTZ.[10] The intention, Mr. Moss, would be that State railroad full crew laws would not be affected. I am obviously not in a position to foreclose any question of interpretation which might arise but our investigation has gone to the extent of consideration of whatever case law might seem to bear most directly on that and wanting to observe the propriety of not foreclosing any question on that. I call attention to such state-

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pounded by the occasional necessity to rely upon "what went on in the mind of an imaginary average congressman deliberating on a question that no one actually considered." Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297, 1348 (1954). The contrast with Public Law 88-108 was noted by Representative Halleck: "We are up against a different proposition here today." 109 CONG. REC. 16138 (1963). Even full flowering of NLRA preemption has not barred the State of Arkansas from preserving safety on its public highways. *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131 (1957).

[9]Because of its impact and consistency, a verbatim transcript of every reference to state full crew laws in the legislative history of Public Law 88-108 is reproduced as Appendix C to this brief.

[10]The Secretary of Labor presented and interpreted the administration proposal.

ments as those of the *Missouri Railroad Company* v. *Norwood*, the Supreme Court case in 1930 in which the Court said, "In the absence of a clearly stated purpose so to do Congress will not be held to have intended to prevent the assertion of the police power of the States for the regulation of the number of men to be employed in such crews." It would be the intention reflected here that the issuance of an interim ruling, subject to termination in a time period or at the agreement of the parties, would not have the effect of affecting any State full crew law.

*Hearings on H.J. Res. 565 (Railroad Work Rules Dispute)*, 88th Cong., 1st Sess. [hereinafter *House Hearings*], 78.

The committee does not intend that any award made under this section [Section 3] may supersede or modify any State law relating to the manning of trains.

H.R. REP., 14.

Senator THURMOND. I believe that there are about 17 States that have laws establishing minimum crews for the manning of trains. Is that the correct number, around that?

Mr. WALRATH [Chairman, Interstate Commerce Commission]. I have heard that; I believe it is true.

Senator THURMOND. These laws are based upon the rights of the States to regulate industry in setting up minimum safety standards for the public as well as the employees, especially to protect the public. I wonder, in your opinion, what effect, if any, would a ruling by the ICC in regard to the crew-consist problems have upon these States hav-

ing laws establishing minimum crews in the manning of trains. In other words, would your rulings preempt the various State laws on this matter?

Mr. WALRATH. Senator Thurmond, I want my general counsel to correct me if I am wrong. Let me put it this way: I heard that question asked of the Secretary of Labor in the House only yesterday. He said that it had been researched by his legal staff. I am not aware that we have researched it recently. But his opinion was that the passage of this or any rules that we approve would not affect the operation of State laws.

*Hearings on S.J. Res. 102 (Railroad Work Rules Dispute)*, 88th Cong., 1st Sess. [hereinafter *Senate Hearings*], 400.

Mr. SISK [Representative from California]. Mr. Speaker, I requested this time to ask a question of the chairman of the Committee on Interstate and Foreign Commerce regarding the provisions of State laws having to do with the full crew laws that are in existence, I understand, in some 17 States, including the State of California. May I ask this question of the chairman of the committee: Is it his understanding that nothing in this joint resolution is to any way preempt on behalf of the Federal Government the field affecting State full crew laws? If he may make a comment on this, I would appreciate it.

. . . .

MR. HARRIS. This issue was raised in the course of the hearings before the committee. Questions were asked of the various people representing management and the labor industry and witnesses representing the labor brotherhoods, the employees' representatives, and the Secretary of Labor. It

was made rather clear in the course of the hearings that it would in no way affect the provisions of State laws. The committee in executive session discussed the question and concluded that it was not the intent of the committee in any way to affect State laws. On page 14 of the committee report we included, in order that this history might be made, this language:

> The committee does not intend that any award made under this section may supersede or modify any State law relating to the manning of trains.

In a footnote on page 112 of the hearings before the committee on House Joint Resolution 565, the original bill, there is a discussion of the legal basis for State "full crew" laws, and a citation to several Supreme Court decisions upholding these laws, such as *Missouri Pacific R.R. Co.* v. *Norwood* (283 U.S. 249). Therefore, since this bill does not mention the subject of State laws, and since, as the committee report shows, we do not intend to affect these laws, I am confident they are not affected by the bill. I think that is about as clear as we can make it.

Mr. SISK. Mr. Speaker, I appreciate the statement of the distinguished chairman of the Committee on Interstate and Foreign Commerce. Then certainly as I would understand it, of course, it would be the intent of the Congress that we are not preempting the field in which State have legislated in this area.

109 CONG. REC. 16122 (1963).

Two items are cited by the railroads in rebuttal to the massive congressional rejection of preemption during

consideration of Public Law 88-108. Motion to Affirm, 18-20. One is the response of Representative Smith of Virginia to the declaration of Chairman Harris quoted above. 109 CONG. REC. 16122 (1963). Perhaps at first blush some confusion is created by Mr. Smith's reluctance "to remain silent." But the essence of his statement, that states cannot affect interstate commerce because of the commerce clause of the federal Constitution, paraphrases a theory so discredited as to be totally immaterial. "Statements concerning the 'exclusive jurisdiction' of Congress beg the only controversial question: whether Congress intended to make its jurisdiction exclusive." *California* v. *Zook*, 336 U.S. 725, 731 (1949).

The brotherhoods can agree that the other element of legislative history cited by the railroads is highly persuasive. But its consequences only emphasize stated congressional intention not to preempt.

The railroads point out that the general counsel of the Interstate Commerce Commission informed committees of both houses that if they wished to make "doubly" or "absolutely certain" that state full crew laws would continue in effect, they might do so by exempting application to this work rules arbitration of an Interstate Commerce Act provision which might be construed to allow supersession.[11] *House Hearings*, 614; *Senate Hearings*, 401; Motion to Affirm, 19-20.

Congress responded to this advice—by taking all reference to the Interstate Commerce Act out of the resolution.

The original recommendations of President Kennedy would have awarded jurisdiction over the entire dispute

[11]The court below reasons that if Congress did not intend to preempt, it would have included such instructions in the statute itself. R. 266. The converse is more consistent with the weight of authority. *E.g.*, *California* v. *Zook*, 336 U.S. 725, 733 (1949); *Parker* v. *Brown*, 317 U.S. 341, 351 (1943); *Maurer* v. *Hamilton*, 309 U.S. 598, 614 (1940).

to the Interstate Commerce Commission. R. 53-54. When the full crew law issue was raised, the committees received several presentiments of danger to their intention to preserve the state enactments, arising primarily out of Section 5(11) of the Interstate Commerce Act.[12] The warning of a brotherhood witness was explicit:

> Mr. SCHOENE [General Counsel, Railway Labor (union) Executives' Association]. I certainly visualize that as a bare minimum the carriers will contend that the effect [of] orders of the Commission authorizing decreases in crew consist—either of enginecrew or traincrew—would operate to overrule full crew laws in those States that have them. Perhaps that explains the alacrity with them which the carriers embraced the President's recommendation and endorsed it. . . . Perhaps this is the main thing they are looking to, to supersede the laws of the States. But I have no notion whether it stops there. This language is much more extensive. [Quotation from Section 5(11) of Interstate Commerce Act.] I have no notion [what] health and safety laws of the States may be claimed to be superseded by order of the Interstate Commerce Commission. . . . This a completely uncharted but highly dangerous field.

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[12] "The authority conferred by this section shall be exclusive and plenary, and any carrier . . . participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved and provided for. . . ." 49 U.S.C. § 5(11) (1964). There was substantial (but now academic) question as to whether the reference to "the procedures and provisions of section 5 of the Interstate Commerce Act" contained in Section 1 of the Presidential proposal included the power to preempt; a legal memorandum on the point was prepared at the request of the Chairman of the House Committee. *House Hearings*, 111-13.

*Senate Hearings*, 629.

The warnings were heeded. Both committees reported out bills which dropped reference to the Interstate Commerce Act altogether. S. REP., 8-9; H.R. REP., 5. Senator Morse made a determined effort on the Senate floor to return administration of the dispute settlement procedure to the I.C.C., but his proposal was defeated overwhelmingly. 109 CONG. REC. 15950-52 (1963). See also 109 CONG. REC. 15967 (1963).

Rejection of the ICC, with its preemption possibilities, was expressly at the behest of the railroad brotherhoods. 109 CONG. REC. 16126 (1963); S. REP., 9. Committee decisions on the issue were virtually unanimous. 109 CONG. REC. 15902, 16129 (1963). Congress did not merely *say* it did not want to preempt; it *acted* to discard any procedure which would be subject to any inference of preemption.

The claim of the railroads in this case is especially contrived since their own leaders were participants in the process of preemption rejection during the congressional hearings. "This record is convincing that there was general understanding between both the supporters and the opponents" of Public Law 88-108 that it would not affect state full crew laws. See *Brotherhood of Railroad Trainmen* v. *Chicago River & I. R.R.*, 353 U.S. 30, 39 (1957).

> Mr. STAGGERS [Representative from West Virginia]. Would this supersede any of the State laws with respect to full crews and so forth?
>
> Mr. WOLFE [Chairman, National Railway Labor (management) Conference]. As we understand it, and this understanding is largely the result of our hearing what Secretary Wirtz testified to yesterday, it would not preempt any State full crew laws.

*House Hearings,* 562.

> Mr. Moss [Representative from California]. In other words, you are not seeking here, nor does the resolution, any elements of compulsion other than purely interim compulsion while the mechanics of bargaining continue?
>
> Mr. WOLFE. I so understand the resolution.
>
> Mr. Moss. Then this question of full crew laws must of necessity be continued subject to the laws of the States and no preemption expressed in the resolution we take, because if it were we would be granting a right beyond that which would have been achieved by any collective bargaining procedure?
>
> Mr. WOLFE. I don't know, you may be getting beyond my field.
>
> Mr. MOSS. I do not think so, Mr. Wolfe. I believe you are a most knowledgeable individual.
>
> Mr. WOLFE. Thank you, sir.
>
> Mr. Moss. And a most competent one. You cannot at the moment conceive of any method whereby you could affect the full crew laws of the 17 States by collective bargaining procedures.
>
> Mr. WOLFE. I agree to that. We cannot negotiate the elimination of a statute no matter how intolerable or unjustified it may be.

*House Hearings,* 570. See also *House Hearings,* 537. The testimony of brotherhood witnesses indicated an understanding that Congress did not wish to displace full crew laws, but a fear of railroad manipulation of Interstate Commerce Act procedures into a preemption theory. *House Hearings,* 837-38; *Senate Hearings,* 478, 629.

Perhaps the most telling railroad admission that Congress did not intend to foreclose enforcement of the state laws was submitted in calculated written form, subject to none of the infirmities of oral response under pressure. *Senate Hearings*, 707-22. The official railroad position scornfully dismissed fears of the brotherhoods about loss of employment. The railroads did not, they maintained, urge passage of the resolution to "put all of these men out on the street." The "facts," asserted the railroads, are these:

> A study made by the carriers indicates that 25.9 percent of the firemen positions in freight and yard service must be maintained because of the provisions of so-called full-crew laws of the states of [listing 13 states, including Arkansas], and that approximately 50 percent of the redundant positions occupied by unneeded trainmen and switchmen are protected by the laws of these States and those of [listing 3 states]. In these States, even even when redundant employees are removed from the working lists through natural attrition, new unneeded employees must be hired to fill their positions.

*Senate Hearings*, 707.

To dramatize the point, the railroads submitted a table showing that 17,870 positions out of the 51,500 that might be eliminated under an arbitration award were "protected by State laws." *Senate Hearings*, 708. See also Shils, *Industrial Unrest in the Nation's Rail Industry*, 15 Lab. L. J. 81, 109 (1964).

In the face of these admissions designed to encourage passage of the resolution, initiation of this case gives substance to brotherhood fears about "highly dangerous"

expansion of railroad contentions. See *Senate Hearings*, 629.

C.

In accordance with final instructions of Congress in the text of Public Law 88-108, Arbitration Board No. 282 was established, took testimony and issued an award. R. 80-174. See *Brotherhood of Locomotive Firemen* v. *Chicago, B. & Q. R.R.*, 225 F.Supp. 11 (D.D.C. 1964), *affmd.*, 331 F.2d 1020 (D.C.Cir. 1964), *cert. den.*, 377 U.S. 918 (1964).

Whether the award is considered to be congressional action, or merely administrative interpretation of such action, the Board was true to the intent not to interfere with continued enforcement of state full crew laws.

Preliminarily, neutral members of the Board noted:

> We are an arbitration board, established to settle two particular points of controversy in a specific labor dispute. Though our authority comes from Congress, the issues we must decide were framed by the parties, and the scope of our action cannot exceed the scope of the actions which the parties themselves might have taken with respect to these issues had they been able to reach agreement. There are many questions of general social policy, community action, or legislation which bear on the problems before us, but they are not within our purview. R. 97.

Within this narrow jurisdiction, the Board observed three policy considerations: adequate and safe transportation service, interests of affected carriers and employees, and fidelity to the areas of disagreement narrowed by prior negotiation and mediation.[13]

[13]One of the earlier mediation efforts was undertaken by a Presidential Railroad Commission appointed in 1960 by President Eisenhower.

The first of the two substantive issues assigned by Congress to the Board, the "use of firemen (helpers) on other than steam power," was resolved by the Board itself. R. 82-89. The second, "consist of road and yard crews," was referred with instructions to local special boards because "the consist of crews necessary to assure safety and to prevent undue work loads must be determined primarily by local conditions." R. 89-95. See also, *e.g.*, R. 176-202; *Brotherhood of Railroad Trainmen* v. *Chicago, M., St.P. & Pac. R.R.*, 345 F.2d 985 (D.C.Cir. 1965).

In addition to its disclaimer of authority over "questions of general social policy, community action, or legislation which bear on the problems before" it, the Board was responsive specifically to congressional intention to preserve state full crew laws.

Following its conclusions on the reduction of jobs, the Board addressed itself to the "equities of dismissed persons," pointing out:

> On its face this [job elimination] procedure would seem to permit the individual carriers immediately to stop assigning firemen on ninety per cent of the freight engine crews and yard engine crews which they listed initially. That it will not have

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See R. 75. Subsequent mediation bodies made "relatively liberal" recommendations, including more gradual reduction of jobs and increased assistance to affected employees. R. 125-28. The Report of the Presidential Railroad Commission was attached as exhibit 2 to the motion for summary judgment filed by the railroads in this case. The brotherhoods excluded this document from the designation of record to be printed in No. 69, although the State agreed to its inclusion in No. 71. The brotherhoods contend, in agreement with the Chairman of the House Committee on Interstate and Foreign Commerce, that this document is irrelevant to the federal legislative action. *House Hearings*, 986. Specifically, the Commission went beyond the issues raised by the parties at the inception of the dispute, and made gratuitous and expansive proposals to "inaugurate an era of change, [although] realizing that all these reforms cannot be accomplished at once." *House Hearings*, 905; *Senate Hearings*, 236; Arnow, *Findings of the Presidential Railroad Commission*, 14 LAB. L. J. 677, 680 (1963).

> such an effect is due to three reasons. First, it will be necessary to provide jobs for firemen whose rights to continue employment are guaranteed by the terms of the award. . . . Second, *a number of States, by law or administrative regulation, require the use of firemen in road freight or yard service.* Finally, [the parties have agreed to retain firemen under certain circumstances]. R. 121. (Emphasis added.)

To be certain that special boards dealing with the crew consist issue on a local basis continued application of congressional intent, the Board directed such tribunals to be "governed," *inter alia*, by "State, county, or municipal regulations applicable with respect to highway, street, road, railroad, or other crossings or intersections." R. 93.

Thus the argument advanced by the railroads in urging Congress to pass an arbitration resolution—that state full crew laws would reduce the burdensome effect of an award on employees—came to fruition.[14]

This careful forbearance in the exercise of federal authority is classic recognition of the power of Congress to enter a field with precisely the abstention it deems advisable. *California* v. *Zook*, 336 U.S. 725, 728 (1949). The federal government may refer to, and thereby virtually adopt, state action to indicate benchmarks for the metes

[14]The railroad members of the arbitration panel were "disappointed" with provisions of the award which protected employees and "which preclude the elimination of many redundant positions in train crews," but they did not suggest that the Board exceeded congressional directives in its recognition of the continued efficacy of state full crew laws. R. 138-40. In April, 1965, the chief negotiator for the railroads reported on the effect of the award in eliminating jobs of firemen, and added a prediction that repeal of full crew laws by the states would permit a further cutback in the future. *Report on Elimination of Rail Firemen's Jobs*, 58 L.R.R.M. 53 (1965).

and bounds of the particular exercise of federal power.[15] *Gibbons* v. *Ogden*, 9 Wheat. 1, 207 (1824); *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502 (1962).

D.

The railroads are not aided by subsidiary tests of supersession even if the expression of congressional intention not to preempt state full crew laws is ignored. *New York Cen. R.R.* v. *Lefkowitz*, 259 N.Y.S.2d 76 (Sup. Ct. 1965); *Chicago & N.W. Ry.* v. *La Follette*, 135 N.W.2d 269 (Wis. 1965).

Most certainly Public Law 88-108 is not pervasive. "It would be difficult to find a [statute] in which the intention of Congress to circumscribe its regulation and to occupy a field limited by definite description is more clearly manifested." *Kelly* v. *Washington*, 302 U.S. 1, 13-14 (1937). See *Reid* v. *Colorado*, 187 U.S. 137 (1902).

The President recommended that Congress refer to the Interstate Commerce Commission all the issues which were specified at the initiation of the current work rules dispute. R. 48-49. After intense consideration, Congress limited jurisdiction of an *ad hoc* arbitration panel to the use of firemen on other than steam power and the consist of road and yard crews. R. 76-77. See 109 CONG. REC. 15952-62 (1963); S. REP., 9, 12; H.R. REP., 5. Remaining issues, such as the manning of self-propelled vehicles, interdivisional runs, the combination of road and yard work, wage and fringe benefits, and the training of engine service

[15]As the railroads persist in contending that Congress occupied the same area as that of state full crew laws, it is arguable that this very lawsuit seeks violation of the commands of Public Law 88-108. Section 1 provides that "no carrier which served the notices of November 2, 1959 . . . shall make any change except by agreement, or pursuant to an arbitration award as hereinafter provided. . . ." R. 76. Since the brotherhoods have not agreed to elimination of the state crew requirements, and the arbitration opinion expressly deferred to them, this action seeks authority to make a change which has been barred by the terms of the joint resolution.

employees, were remanded by Congress to the parties for continued negotiation.[16] See *Senate Hearings*, 17-19; *House Hearings*, 706-11.

Not only were the issues limited. Public Law 88-108 is confined to prescribed parties. 109 CONG. REC. 16130 (1963). It was observed repeatedly in Congress that the Southern Railway System, operating in fourteen states, was not involved. *Senate Hearings*, 369, 572; *House Hearings*, 561, 813-14. See also *Division 700* v. *National Ry. Lab. Arb. Bd.*, 224 F.Supp. 366 (D.D.C. 1963) (Union R.R. excluded). Several Class I railroads unsuccessfully requested coverage by the congressional action. See *Senate Hearings*, 706-07; *House Hearings*, 1025-26. Omission of major segments of the industry is in substantial contrast with other railroad legislation. *E.g.*, Federal Safety Appliance Act, 49 U.S.C. §§ 1, 26 (1964).

A most persuasive negation of pervasiveness is the temporal limitation of the federal action. The resolution expired 180 days after its enactment, and the award will expire ~~on November 24, 1965~~ in early 1966. R. 95. See *Brotherhood of Railroad Trainmen* v. *Boston & M. R.R.*, 59 L.R.R.M. 2797, n. 1 (D.Mass. 1965). This limitation was not casual; from the message of the President to final passage, legislative history is marked by preoccupation with the interim nature of the remedy.[17] *E.g.*, *Senate Hearings*, 8, 11, 49, 80-81, 364,

[16]This confidence in the collective bargaining process was not misplaced. On April 22, 1964, President Johnson announced a negotiated agreement of the parties on these issues. Comment, *The Railway Work Rules Dispute—A Precedent for Compulsory Arbitration*, 14 DE PAUL L. REV. 115, 128 (1964).

[17]In the face of this preoccupation, a conclusion that the Arkansas full crew laws are preempted not only for the duration of the arbitration award but permanently collides resoundingly with the requirement that congressional intent be measured carefully. Primal principles of judicial abstention make such a conclusion, unnecessary for resolution of the issues presented by the pleadings, gratuitous dictum. The brotherhoods decline to mount a major defense to this argument, both because of its immateriality and because Congress did not intend to preempt for any period. If

427; *House Hearings*, 50-51, 115, 552, 569.

A second subsidiary test of preemption invokes a mystique about "occupation of the field." Such intrusion is difficult to visualize in view of the overwhelming reluctance of Congress to act at all.

> [T]here is not a person in this Senate, Democrat or Republican, or in the House, who wants to take a bite at this issue.

*Senate Hearings*, 460.

> If we are going to resort to this kind of a bill, I want to make sure that it is just as temporary and just as limited as possible. . . .

*Senate Hearings*, 397.

> There was, I must confess, an overriding reluctance for Congress to enter into this dispute, and there was sometimes a too optimistic remaining hope that something would happen and we would not be required to act.[18]

109 CONG. REC. 15892 (1963). See also *Senate Hearings*, 517-18.

> [A]s we are venturing into a very seriously dangerous field in terms of American freedom, at least we can try to do it with the minimum impact. . . .

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the issue should be reached by the Court, the intent of Congress to limit the effect of its action demands reversal of this conclusion by the court below. See also *In re Rahrer*, 140 U.S. 545, 565 (1891); *Amalgamated Assn. of Street Ry. Employees* v. *Wisconsin Employment Rel. Bd.*, 340 U.S. 416 (1951).

[18]Under the aegis of individuals and groups of congressional and administration officials, determined but unsuccessful efforts were made up until final passage of the resolution to resolve the dispute by negotiation between the parties. *Senate Hearings*, 76, 474-78, 517, 678; *House Hearings*, 544, 663, 775, 944-45; 109 CONG. REC. 15891, 15900 (1963).

109 Cong. Rec. 15960 (1963).

The reluctance was translated into rigidly abstentious action. Congress was faced with a specific threat, a railroad strike, and acted only to avert that threat. See *Senate Hearings*, 417-25, 703-05; *House Hearings*, 953-72; S. Rep., 7; H.R. Rep., 13.

> My suggestion is that you have not accomplished anything with this legislation except one single thing, and that is you have put off a strike.[19]

*House Hearings*, 56.

There were other possible courses, any of which would have demonstrated pervasive purpose in excess of Public Law 88-108. Congress could have established mediation or permanent compulsory arbitration of the entire work rules dispute, federal seizure of the railroads or the substance of work rules themselves. This last possibility, with prior congressional precedent, was mentioned repeatedly, but rejected soundly. 109 Cong. Rec. 15969-71, 16134 (1963); *Senate Hearings*, 460; *House Hearings*, 73, 96, 544. Compare *Wilson* v. *New*, 243 U.S. 332 (1917); *Senate Hearings*, 77-79.

An assumption that federal and state power are being exercised in the same "field" does not of itself invalidate the state action. *Colorado Anti-Discrimination Commn.* v. *Continental Air Lines, Inc.*, 372 U.S. 714 (1963). There is no actual or potential conflict or impossibility of compliance with both enactments. As in *Florida Lime Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963), a remarkably analogous case on this point, the fact that state protection of the public may be more stringent than federal "demonstrates no inevitable collision between the two schemes of regula-

[19]Public Law 88-108 was also described as "strictly a procedural matter," and "what the parties had already basically agreed upon," "incorporated in legislative form." *Senate Hearings*, 370; S. Rep., 9.

tion." 373 U.S. at 143. What Congress intended, here as there, was to invite contending parties to get together under the auspices of a federal agency and relieve a temporary problem. This is not conflict compelling preemption. See also *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440 (1960); *H. P. Welch Co.* v. *New Hampshire*, 306 U.S. 79 (1939).

## E.

Finally, the railroads assert, the Railway Labor Act and the Interstate Commerce Act, "even apart from" Public Law 88-108, displace Arkansas full crew laws.[20] R. 40-41; Motion to Affirm, 13-14, n. 7.

These contentions have been answered with such authority that no more than summary response seems necessary. As for the Railway Labor Act, the landmark decision is as reasonable now as it was in 1943, well after statutory amendments with any pertinence to the issues at bar.[21]

> The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental

[20]The railroads also have announced a plan to dispute the conclusion of all three judges below that there are genuine issues of material fact which bar summary disposition of their commerce clause contentions. Motion to Affirm, 14. After express approval of the Arkansas full crew laws in a commerce clause case, *Southern Pac. Co.* v. *Arizona*, 325 U.S. 761, 779 (1945), substance to this plan is illusory. At the very least, remand for submission of evidence seems mandatory. *Florida Lime Growers, Inc.* v. *Paul*, 373 U.S. 132, 136-37 (1963).

[21]In spite of many congressional proposals for amending the Railway Labor Act, changes have been few. Weber, *Public Policy and the Scope of Collective Bargaining*, 13 LAB. L. J. 49, 54 (1962); Shils, *Industrial Unrest in the Nation's Rail Industry*, 15 LAB. L. J. 81 (1964). The 1934 amendments, 48 STAT. 1185 (1934), added a procedure for formalizing the collective bargaining agency and an arbitration panel for settlement of grievances or "minor disputes." Since 1934 the only changes have been to extend coverage of most of the Act to the airline industry, 49 STAT. 1189 (1936), and to permit union security arrangements. 64 STAT. 1238 (1951). There were suggestions during hearings on Public Law 88-108 that the whole field of railway labor law may need revision some time in the future. *E.g.*, *House Hearings*, 115-16.

> regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed in those Acts is not primarily in working condition as such. . . . The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce. The Mediation Board and Adjustment Board act to compose differences that threaten continuity of work, not to remove conditions that threaten the health or safety of workers. . . . [W]e would be hardly expected to hold that the price of the federal effort to protect the peace and continuity of commerce has been to strike down state sanitary codes, health regulations, factory inspections, and safety provisions for industry and transportation.

*Terminal R.R.* v. *Brotherhood of Railroad Trainmen,* 318 U.S. 1, 6-7 (1943). Railway Labor Act interdiction of direct state interference with labor-management relations has been found, but not of "local health or safety regulation." *California* v. *Taylor,* 353 U.S. 553 (1957); *Railway Employes' Dept.* v. *Hanson,* 351 U.S. 225 (1956). See *Local 24* v. *Oliver,* 358 U.S. 283, 297 (1959).

The national transportation policy, a preamble to the Interstate Commerce Act, is of no assistance to the railroad contentions here. 49 U.S.C. preceding § 1 (1964). Even its generalities require comity with the states. It is invoked regularly by railroad attorneys, but repeatedly found insufficient to modify specific congressional intent. *E.g., Order of Railroad Telegraphers* v. *Chicago & N.W. Ry.,* 362 U.S. 330 (1960); *Atchison, T. & S.F. Ry.* v. *Railroad Commn.,* 283 U.S. 380 (1931); *Lehigh Valley R.R.* v. *Board of Utility Commnrs.,* 278 U.S. 24 (1928).

General congressional policy implications are unnecessary for the issue at bar. Congress has not set forth "a clearly expressed purpose" to preempt since *Missouri Pac. R.R.* v. *Norwood*, 283 U.S. 249 (1931), in which both Railway Labor and Interstate Commerce Acts were urged as superseding full crew laws. The central holding of *Norwood* was considered by Congress during the processing of Public Law 88-108, and still no such expression issued. To the contrary, Congress made any implications of the national transportation policy of the Interstate Commerce Act flatly immaterial by expunging its interrelation with Public Law 88-108.

The particular intention of Congress to preserve full crew laws in the passage of the work rules arbitration resolution cannot be controlled by general implications of other enactments, even assuming that earlier cases which reject preemption are no longer viable as authority. See Motion to Affirm, 13-14, n. 7.

III. Invalidation of Arkansas Full Crew Laws on Preemption Principles Could Result Only from Judicial Evaluation of the Merits of the Work Rules Dispute, a Constitutionally Unjustifiable Interference with the Political and Legislative Process.

A.

The decision of the court below menaces a process fundamental to democracy.

The railroads argue that full crew laws have become "unneeded" and "obsolete." *E.g.*, Motion to Affirm, 15, n. 9. Assuming this economic and social development may have taken place, its recognition *and* the nature of the response to its recognition are valuable aspects of a process of lawmaking assigned by the Constitution to the legislatures and the people. Confiscation of this process by the judiciary is the most genuine "preemption" in the decision below.

> It is relevant to recall that the [statute under consideration] was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests. This is relevant in that it counsels wariness in finding by construction a broad policy against [a general aspect of labor-management relations] as such when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment in enacted law. The problem raised by these cases affords a striking illustration of the importance of the truism that it is the business of Congress to

> declare policy and not this Court's. The judicial function is confined to applying what Congress has enacted after ascertaining what it is that Congress has enacted.

*Local 1976* v. *N.L.R.B.*, 357 U.S. 93, 99-100 (1958).

This application of the judicial function "truism" by Mr. Justice Frankfurter is remarkably germane to the instant case. What Congress enacted in Public Law 88-108 is clear; a general policy of avoiding anything other than an immediate strike threat, and a specific policy of preserving state full crew laws dominate its legislative history and are apparent in its text.

There have been few conflicts in American economic and political history to equal the struggle between the railroads and railroad brotherhoods over work rules. Weber, *Public Policy and the Scope of Collective Bargaining*, 13 LAB. L. J. 49 (1962). Congress and the people it represents had the benefit of vigorous presentation of deeply held views from both sides in striking the balance that became Public Law 88-108.

The railroads announced that "railroad featherbedding" costs "everybody" $500,000,000 a year, more than the San Francisco earthquake of 1906, the Chicago fire of 1871, or the Texas City disaster of 1947. *House Hearings*, 866-68. State full crew laws, the Senate was informed, require "unneeded" and "redundant" employees. *Senate Hearings*, 707. "Featherbedding," it was proclaimed, increases accidents, as demonstrated by casualty rates in the states which have "excess crew" "featherbed" laws.[22]

[22] "I have even read newspaper accounts of remarks of railroad officials bragging that the 'featherbedding' campaign was the basis for the decision of the Presidential Railroad Commission and even the Supreme Court decision in this case. I am sure such is not the case, but I am just as sure that the antagonism generated by that word put this problem in our laps." 109 CONG. REC. 16130 (1963).

*House Hearings,* 869. "No nation," warned newspaper advertisements signed by "American Railroads," "however rich, can afford such a crushing burden of totally unnecessary waste year after year." *House Hearings,* 870.

The process of political persuasion is not unknown to the brotherhoods.[23] "I have seen lobbies," said Senator Morse, "but I have never seen the kind of political lobby in operation that I have seen in recent days in the precincts of Congress on the part of the railroad brotherhoods." 109 Cong. Rec. 15961 (1963). Perhaps applicable to both sides was the observation of Senator Simpson about the delay in final passage of the resolution. "One reason may be the political maneuvering that has been evidenced in an attempt to win political favor by some Members of this body." 109 Cong. Rec. 15939 (1963). See Kaufman, *The Railroad Labor Dispute: A Marathon of Maneuver and Improvisation,* 18 Ind. & Lab. Rel. Rev. 196 (1965).

This is not to suggest that attempts to persuade the American public and Congress are nefarious to any degree. To the contrary, Congress is the constitutional repository of the popular will, recognized as such from James Madison to George Meany.

> The members of the legislative department, on the other hand, are numerous. They are distributed and dwell among the people at large. Their connections of blood, of friendship and of acquaintance, embrace a great proportion of the most influencial part of society. The nature of their public trust implies a personal influence among the people, and that they are more immediately the confidential guardians of the rights and liberties of the people.

[23]For a plaintive railroad complaint about the political effectiveness of the brotherhoods, see Prince, *Railroads and Government Policy—A Legally Oriented Study of an Economic Crisis,* 48 Va. L. Rev. 196, 249-50 (1962).

*The Federalist No. 49*, THE FEDERALIST 338, 341-42 (Cooke ed. 1961).

> When you say "more intelligently," yes; not to say that the people in the ICC are not intelligent but that Members of Congress have closer contact to this sort of thing than do the people of the ICC. The Members of Congress meet people. They are constantly dealing with people, and not dealing with the questions that come before the ICC. And this is a problem of people.

*Senate Hearings*, 600 (George Meany, President of the AFL-CIO, explaining the opposition of the labor movement to submission of the work rules dispute to the Interstate Commerce Commission).

Congress accepted the issue as a "problem of people." There are more execrable horrors to the American people than "featherbedding" and dearer values than "making the trains run on time." The severe limitations of Public Law 88-108 reflected, for example, an historic fear of compulsory arbitration.[24] *E.g., Senate Hearings*, 11, 574-78.

It might be assumed, *arguendo*, that state full crew laws are anachronistic rules unresponsive to contemporary railroading.[25] The President proffered the issue as part of

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[24]This sentiment is not unknown to this Court. *Chas. Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U.S. 522 (1923). "Each intervention of the government tends to discourage, and often to inhibit, genuine collective bargaining; if there is much likelihood that government will intervene, the party that thinks it may profit thereby will act so as to bring that intervention about, with the result that meaningful collective bargaining will tend to disappear from vital segments of the economy." Seidman, *National Emergency Strike Legislation*, SYMPOSIUM ON LABOR RELATIONS LAW 473, 474 (Slovenko ed. 1961).

[25]This is not, it should be emphasized, actually conceded by the brotherhoods. See footnote 5, *supra*. The railroads state a cause of action, of course, by alleging that changes in operating conditions create due process infirmities in the state enactments. *Missouri Pac. R.R.* v. *Norwood*, 283 U.S. 249 (1931); *Chicago & N.W. Ry.* v. *La Follette*, 135 N.W.2d 269

a larger problem of automation. R. 50-52. The most lauded treatment of such problem includes a gradual reduction of jobs—but a more gradual reduction of the human beings that perform the jobs.[26] The number of railroad employees has dropped drastically in recent decades (and undoubtedly will continue to drop), but the passage of time can ameliorate "the unpleasant prospect of human obsolescence." See R. 51.

This gradualism is a value of substance which Congress was entitled to recognize, and did recognize by allowing states to continue their own limitation on the impact of obsolescence. The railroads will respond that Arbitration Board 282 considered the problem of decreasing employment. But Congress established a mandatory minimum to such recognition, limiting the power of the Board by preserving the employee protection that state full crew laws afford.

State laws are not immutable. As the railroads pointed out repeatedly to the lower court, full crew legislation is being eliminated by normal political processes as the railroads are able to convince the people that they are undesirable. Several such enactments have been repealed since the passage of Public Law 88-108.[27] *E.g.*, MISS. CODE ANN. §§ 7759-61 (1942) (repealed by the state legislature on March 5, 1964); DEERING'S CALIF. LABOR C.A. §§ 6901-10 (Repl. Vol. 1964) (repealed by popular referendum in November,

(Wis. 1965). On remand this allegation will be tested by the crucible of trial, which it consistently has failed to survive. *E.g., New York Cen. R.R. v. Lefkowitz*, 259 N.Y.S.2d 76 (Sup. Ct. 1965).

[26]See, *e.g.*, Pollera, *Automation and Retraining: The Steelworkers-Kaiser Steel Experience*, N.Y.U. SIXTEENTH ANN. CONF. ON LABOR 73 (1963).

[27]An interesting state action which also recognizes the ameliorative value of deferring reduction of railroad employment is the repeal of the Oregon train crew law, signed by Governor Hatfield on June 2, 1965, but not effective until 1967. *Chronology of Recent Labor Events*, 88 MON. LAB. REV. 867 (1965).

1964).[28] An easy initiative procedure is available to the railroads in Arkansas if they are unable to persuade the legislature about their position. ARK. CONST., Amdmt. No. 7; *Hope* v. *Hall*, 229 Ark. 407, 316 S.W.2d 199 (1958). This is the path which the Constitution, Congress and this Court leave clearly accessible.

B.

Judicial abstention from economic and political policy decisions has classic forbears.

> It can be of no weight to say, that the courts on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it proved anything, would prove that there ought to be no judges distinct from that body.

*The Federalist No. 78*, THE FEDERALIST 521, 526 (Cooke ed. 1961).

The precept which the brotherhoods urge for preemption evaluation has been the essence of analogous constitutional consideration by this Court. It has been couched in terms of separation of powers, or restraint on political questions. *Marbury* v. *Madison*, 1 Cr. 137 [at page] 64

[28] An American Bar Association report described the California repeal as action which "made the award of Federal Arbitration Board No. 282 applicable in California." *Report of the Committee on State Labor Legislation*, Section of Labor Relations Law, A.B.A., 25 (August, 1965; mimeographed).

(1803); *Mississippi* v. *Johnson*, 4 Wall. 475 (1867); *Baker* v. *Carr*, 369 U.S. 186, 217 (1962). It bars advertence to the "wisdom, need, or appropriateness" of state legislation under due process challenge. *Ferguson* v. *Skrupa*, 372 U.S. 726, 730 (1963); *Truax* v. *Corrigan*, 257 U.S. 312, 357 (1921) (Mr. Justice Brandeis, dissenting: "What, at any particular time, is the paramount public need, is necessarily largely a matter of judgment.").

There are even factually similar cases which exemplify judicial abstention. Railway labor legislation has been characterized by congressional restraint. Weber, *Public Policy and the Scope of Collective Bargaining*, 13 LAB. L. J. 49, 54, 69 (1962); Siegel & Lawton, *Stalemate in "Major" Disputes under the Railway Labor Act—The President and Congress*, 32 GEO. WASH. L. REV. 8 (1963). Correlative restraint was exercised by this Court to effectuate that policy in *Order of Railroad Telegraphers* v. *Chicago & N.W. Ry.*, 362 U.S. 330 (1960). On another phase of the broad problem of technological change, the railroads argued, there as here, about economic stresses and inferences of the Railway Labor and Interstate Commerce Acts.

"These arguments," the Court pointed out, "are addressed to the wrong forum." 362 U.S. at 342. To paraphrase *Telegraphers*, if the scope of state authority to pass full crew laws is to be cut down to prevent "waste" by the railroads, Congress should be the body to do so. "Such action is beyond the judicial province," concluded Mr. Justice Black, "and we decline to take it." 362 U.S. at 342.

The court below may have acted from "orderly" economics and laudable patriotism.[29] Perhaps Congress should

[29] *E.g.*: "Not the least of the court's consideration is the substantial public interest involved relative to the uninterrupted and *orderly* flow of goods in interstate commerce as well as the necessity for an efficient and *orderly* railway transportation system as a part of the national defense effort." R. 273. (Emphasis added.)

have preempted to establish "an efficient and orderly transportation system." But "the clash of fact and opinion should be resolved by the democratic process and not by the judicial sword. Invalidation here would mean denial of power to Congress as well as to the . . . States." *International Bro. of Teamsters* v. *Hanke,* 339 U.S. 470, 478 (1950).

Judicial invalidation of state statutes which Congress intended to preserve, whether through elaborate manipulation of the secondary tests of supersession or simple conviction about the merits of the subject matter, is unjustified arrogation of both state and federal legislative processes.

## CONCLUSION

The brotherhoods respectfully ask the Court to reverse the District Court for the Western District of Arkansas on the preemption issue, and remand the case for further proceedings on the remaining allegations of the complaint.

Respectfully submitted,

JAMES E. YOUNGDAHL
711 West Third Street
Little Rock, Arkansas 72201
*Attorney for the Appellants*

*Of Counsel:*

EUGENE F. MOONEY
McMATH, LEATHERMAN, WOODS & YOUNGDAHL
711 West Third Street
Little Rock, Arkansas 72201

## APPENDIX A

ARK. STAT. ANN. §§ 73-720 through 722 (Repl. Vol. 1957)
(Ark. Acts 1907, No. 116)

*73-720. Crew required on freight trains.* No railroad company or officer of court owning or operating any line or lines of railroad in this State, and engaged in the transportation of freight over its line or lines shall equip any of its said freight trains with a crew consisting of less than an engineer, a fireman, a conductor and three (3) brakemen, regardless of any modern equipment of automatic couplers and air brakes, except as hereinafter provided.

*73-721. Exceptions from Act—Purpose.* This Act shall not apply to any railroad company or officer of court whose line or lines are less than fifty (50) miles in length, nor to any railroad in this State, regardless of the length of the said lines, where said freight train so operated shall consist of less than twenty-five (25) cars, it being the purpose of this Act to require all railroads in this State whose line or lines are over fifty (50) miles in length engaged in hauling a freight train consisting of twenty-five (25) cars or more, to equip the same with a crew consisting of not less than an engineer, fireman, a conductor and three (3) brakemen, but nothing in this Act shall be construed so as to prevent any railroad company or officer of court from adding to or increasing its crew beyond the number set out in this Act.

*73-722. Penalty for violations—Exceptions.* Any railroad company or officer of court violating any of the provisions of this Act shall be fined for each offense not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00), and each freight train so illegally run shall constitute a separate offense. Provided, the penalties of this Act shall not apply during strikes of men in train service of lines involved.

ARK. STAT. ANN. §§ 73-726 through 729 (Repl. Vol. 1957)
(Ark. Acts 1913, No. 67)

*73-726. Switch crews in cities—Requisite members.* No railroad company or corporation owning or operating any yards or terminals in the cities within this State, where switching, pushing or transferring of cars are made across public crossings within the city limits of the cities shall operate their switch crew or crews with less than one (1) engineer, a fireman, a foreman and three (3) helpers.

*73-727. Purpose of act—Number in crew may be increased.* It being the purpose of this Act to require all railroad companies or corporations who operate any yards or terminals within this State who do switching, pushing or transferring of cars across public crossings within the city limits of the cities to operate said switch crew or crews with not less than one (1) engineer, a fireman, a foreman and three (3) helpers, but nothing in this act shall be so construed as to prevent any railroad company or corporation from adding to or increasing their switch crew or crews beyond the number set out in this Act.

*73-728. Application of act to cities of first and second class—Exception.* The provisions of this Act shall only apply to cities of first and second class and shall not apply to railroad companies or corporations operating railroads less than one hundred (100) miles in length.

*73-729. Penalty for violation of act.* Any railroad company or corporation violating the provisions of this Act shall be fined for each separate offense not less than fifty dollars ($50.00), and each crew so illegally operated shall constitute a separate offense.

## APPENDIX B

Public Law 88-108
77 STAT. 132
88th Congress, S.J. Res. 102
August 28, 1963
Joint Resolution

To provide for the settlement of the labor dispute between certain carriers by railroad and certain of their employees.

Whereas the labor dispute between the carriers represented by the Eastern, Western, and Southeastern Carriers' Conference Committees and certain of their employees represented by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railroad Conductors and Brakemen, Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America, labor organizations, threatens essential transportation services of the Nation; and

Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained; and

Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not resulted in settlement of the dispute; and

Whereas the Congress finds that emergency measures are essential to security and continuity of transportation services by such carriers; and

Whereas it is desirable to achieve the above objectives in a manner which preserves and prefers solutions reached through collective bargaining; and

Whereas, on August 2, 1963, the Secretary of Labor submitted to the carrier and organization representatives certain suggestions as a basis of negotiation for disposition

of the fireman (helper) and crew consist issues in the dispute and thereupon through such negotiations tentative agreement was reached with respect to portions of such suggestion; and

Whereas, on August 16, 1963, the carrier parties to the dispute accepted and the organization parties to the dispute accepted with certain reservations the Secretary of Labor's suggestion that the fireman (helper) and crew consist issues be resolved by binding arbitration but the said parties have been unable to agree upon the terms and procedures of an arbitration agreement: Therefore be it

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That no carrier which served the notices of November 2, 1959, and no labor organization which received such notices or served the labor organization notices of September 7, 1960, shall make any change except by agreement, or pursuant to an arbitration award as hereinafter provided, in rates of pay, rules, or working conditions encompassed by any of such notices, or engage in any strike or lockout over any dispute arising from any of such notices. Any action heretofore taken which would be prohibited by the foregoing sentence shall be forthwith rescinded and the status existing immediately prior to such action restored.

*Sec. 2.* There is hereby established an arbitration board to consist of seven members. The representatives of the carrier and organization parties to the aforesaid dispute are hereby directed, respectively, within five days after the enactment hereof each to name two persons to serve as members of such arbitration board. The four members thus chosen shall select three additional members. The seven members shall then elect a chairman. If the members chosen by the parties shall fail to name one or more of the additional three members within ten days, such additional

members shall be named by the President. If either party fails to name a member or members to the arbitration board within the five days provided, the President shall name such member or members in lieu of such party and shall also name the additional three members necessary to constitute a board of seven members, all within ten days after the date of enactment of this joint resolution. Notwithstanding any other provision of law, the National Mediation Board is authorized and directed: (1) to compensate the arbitrators not named by the parties at a rate not in excess of $100 for each day together with necessary travel and subsistence expenses, and (2) to provide such services and facilities as may be necessary and appropriate in carrying out the purposes of this joint resolution.

*Sec. 3.* Promptly upon the completion of the naming of the arbitration board the Secretary of Labor shall furnish to the board and to the parties to the dispute copies of his statement to the parties of August 2, 1963, and the papers therewith submitted to the parties, together with memorandums and such other data as the board may request setting forth the matters with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement. The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist" and implementing proposals pertaining thereto. The arbitration board shall incorporate in such decision any matters on which it finds the parties were in agreement, shall resolve the matters on which the parties were not in agreement, and shall, in mak-

ing its award, give due consideration to those matters on which the parties were in tentative agreement. Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration.

*Sec. 4.* To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act. The United States District Court for the District of Columbia is hereby designated as the court in which the award is to be filed, and the arbitration board shall report to the National Mediation Board in the same manner as arbitration boards functioning pursuant to the Railway Labor Act. The award shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise.

*Sec. 5.* The arbitration board shall begin its hearings thirty days after the enactment of this joint resolution or on such earlier date as the parties to the dispute and the board may agree upon and shall make and file its award not later than ninety days after the enactment of this joint resolution: *Provided, however,* That said award shall not become effective until sixty days after the filing of the award.

*Sec. 6.* The parties to the disputes arising from the aforesaid notices shall immediately resume collective bargaining with respect to all issues raised in the notices of November 2, 1959, and September 7, 1960, not to be disposed of by arbitration under section 3 of this joint resolution and shall exert every reasonable effort to resolve such

issues by agreement. The Secretary of Labor and the National Mediation Board are hereby directed to give all reasonable assistance to the parties and to engage in mediatory action directed toward promoting such agreement.

*Sec. 7.* (a) In making any award under this joint resolution the arbitration board established under section 2 shall give due consideration to the effect of the proposed award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideration to the narrowing of the areas of disagreeement which has been accomplished in bargaining and mediation.

(b) The obligations imposed by this joint resolution, upon suit by the Attorney General, shall be enforceable through such orders as may be necessary by any court of the United States having jurisdiction of any of the parties.

*Sec. 8.* This joint resolution shall expire one hundred and eighty days after the date of its enactment, except that it shall remain in effect with respect to the last sentence of section 4 for the period prescribed in that sentence.

*Sec. 9.* If any provision of this joint resolution or the application thereof is held invalid, the remainder of this joint resolution and the application of such provision to other parties or in other circumstances not held invalid shall not be affected thereby.

Approved August 28, 1963.

## APPENDIX C

### Reference to State Full Crew Laws in Legislative History of Public Law 88-108 July 23 through August 28, 1963

I. HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

*Hearings on H.J. Res. 565 (Railroad Work Rules Dispute)*, Committee on Interstate and Foreign Commerce, House of Representatives, 88th Cong., 1st Sess. (July 24 through August 2, 1963)

*At 78:*

Mr. Moss [Representative from California]. Mr. Secretary, out in my State we have had, I believe since 1913, with amendments as recent as the past 2 years, a full crew law; what is the intended effect of an order issued in the event of enactment of this resolution by the ICC on those laws of some 17 States specifying requirements for railroad crews?

Secretary WIRTZ [Secretary of Labor]. This matter has been one of consideration in connection with the preparation of this proposal. The intention, Mr. Moss, would be that the State railroad full crew laws would not be affected. I am obviously not in a position to foreclose any question of interpretation which might arise but our investigation has gone to the extent of consideration of whatever case law might seem to bear most directly on that and wanting to observe the propriety of not foreclosing any question on that. I call attention to such statements as those of the *Missouri Railroad Company* v. *Norwood*, the Supreme Court case in 1930 in which the Court said, "In the absence of a clearly stated purpose so to do Congress will not be held to have intended to prevent the assertion of the police power of the States for the regulation of the number of men to be employed in such crews." It would be the inten-

tion reflected here that the issuance of an interim ruling, subject to termination in a time period or at the agreement of the parties, would not have the effect of affecting any State full crew law.

Mr. Moss. Thank you.

The CHAIRMAN [Representative Harris from Arkansas]. I don't want to overlook that because I want to talk about it a little later on, Mr. Secretary.

*At 111-13:*

Mr. SIBAL [Representative from Connecticut]. Mr. Secretary, you may have gone into this, and if you have, I apologize both because of the time of day and the long period you have given us, but we were out of the room, many of us, at different times, and I would like to touch on this point:

Do I understand that it is your position that this bill would not supersede the States full-crew laws?

Secretary WIRTZ. Yes, sir.

Mr. SIBAL. And has a thorough job of legal research been done on this?

Secretary WIRTZ. I indicated in my answer to a similar question earlier that the answer to the question of whether there is thorough research, the answer is "No."

Mr. SIBAL. So it is possible that there may be aspects of this which we had better look into?

Secretary WIRTZ. I would not be entitled to foreclose the judgment of the committee on that, but that is our clear view of the intention here.

The CHAIRMAN. I asked about that myself, Mr. Secretary. Is there anything in the Interstate Commerce Act which gives recognition to full-crew laws of the various States?

Secretary WIRTZ. I would want to answer subject to check, but I think not.

The CHAIRMAN. It is my impression that there is not, but the courts have upheld full-crew laws in the various States.

Secretary WIRTZ. That is correct.

The CHAIRMAN. That being true, I wish that you, if your counsel is with you, would point out to me anywhere in this resolution in which this would not supersede the full-crew laws or any other matters involved with work rules as contained in these notices.

Secretary WIRTZ. I think to the best of our knowledge, there would not be anything specifically that had that result.

The CHAIRMAN. I agree with Mr. Sibal, then, that research would be necessary, because it would seem to me the logical conclusion is that this gives the Interstate Commerce Commission authority to supersede these laws.

Secretary WIRTZ. I would respect your views, sir, completely on it.

The CHAIRMAN. I would respect yours, too, but I would like for us all to look into it.

Secretary WIRTZ. I think we should supply for the record the fullest possible exploration of that point.

(The following information was submitted for the record:)

## Effect of an Order Issued by the ICC Under Senate Joint Resolution 102 (Re Railroad Work Rules Dispute) on State "Full-Crew" Laws

### The Problem

Section 1 of the proposed joint resolution provides that work-rules changes *"involving the manning of train or engine crews and the protection of the interests of employees affected thereby"* shall become effective upon application to and approval or modification by the ICC *"in accordance with the procedures [and provisions] of section 5"*[1] of the Interstate Commerce Act.

Section 5(11) of the Interstate Commerce Commission Act provides that—

"The authority conferred by this section shall be exclusive and plenary . . . and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the anti-trust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, *insofar as may be necessary to enable them to carry into effetc* [sic] *the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission. . . .* [*Italic added.*]

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[1]As introduced, this provision of the joint resolution also included the words "and provisions." For purposes of this memorandum, it will be assumed that section 5 is adopted for procedural purposes only. However, even if it were not, and the term "and provisions" remained in the resolution, the memorandum's conclusion, it is believed, would still be valid. House Joint Resolution 565 is identical with Senate Joint Resolution 102: "To provide for the settlement of the labor dispute between certain carriers by railroad and certain of their employees."

The question presented is whether an order issued by the ICC determining the question of "crew consists," pursuant to section 1 of the joint resolution would, under the Federal "premption" [sic] doctrine, require the invalidation of State "full-crew" laws[2] which conflict with the ICC order, particularly in light of section 5(11) of the Interstate Commerce Act.

### The Conclusion

Section 5(11) of the Interstate Commerce Act and pertinent court decisions, support the conclusion that an ICC determination under section 1 would not automatically invalidate State full crew laws, but that instead such invalidation would take place only to the extent that the ICC order so required. Section 5(11) would thus appear to authorize the ICC to approve an interim work rule subject to the condition that it would not be applicable in any State where the law required otherwise. This conclusion appears valid whether or not a joint resolution is considered to adopt section 5 of the Interstate Commerce Act for procedural purposes only.

### Analysis

Section 1 of the joint resolution authorizes certain work rules changes which shall become effective on approval or modification by the ICC "in accordance with the procedures and provisions of section 5 of the Interstate Commerce Act."

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[2]State "full-crew" laws impose minimum crew requirements on trains operating within the State. Typically, they require an engineer, fireman, conductor and brakeman on each train.

There are at least two arguments which can be advanced for the proposition that State "full-crew" laws would not be automatically preempted.[3]

The first is that in incorporating section 5 of Interstate Commerce Act reference, the joint resolution merely adopts the procedural provisions of the section and not the substantive provisions.

This view is supported by the fact that the Congress found it necessary, in section 3 of the joint resolution to provide that the "Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected as provided in section 5(2)(f)" of the Interstate Commerce Act.

If the substantive authority, as well as the procedural requirements of the Interstate Commerce Act were encompassed in the joint resolu-

[3]The Federal Constitution confers upon the Federal Government the exclusive power to regulate interstate and foreign commerce (art. 1, sec. 8, clause 3). The Supreme Court has, in a long line of decisions, held, however, that until Congress legislates on a subject relating to interstate commerce, the States have the power to establish such reasonable regulations as are appropriate for the health, lives, and safety of their citizens. The fact that interstate commerce is materially affected by the State's action does not in itself render the action invalid. So long as the State's regulation does not unduly obstruct or burden the flow of interstate commerce, its action in an area not regulated by Federal law is considered proper.

The enactment of State "full-crews" laws has been held to come within this category of lawful State activity. In a series of cases between 1911 and 1930, the U.S. Supreme Court has upheld the constitutionality of the State "full-crew" laws, ruling that they are not a deprivation of property without due process of law or an undue burden on interstate commerce. (St. Louis, Iron Mountain & Southern Ry. Co. v. Arkansas, 240 U.S. 518 (1916); Chicago, Rock Island & Pacific Ry. Co. v. Arkansas, 219 U.S. 453 (1911); and Missouri Pacific R.R. Co. v. Norwood, 283 U.S. 249 (1930)).

tion there would appear to be no need to refer to section 5(2)(f) or any other provision in section 5.[4]

Secondly, it appears reasonable to conclude that Congress, in enacting section 5(11) of the Interstate Commerce Act, had no intention of foreclosing the possible operation of State law, even where the ICC had acted.

If Congress has intended that Section 5(11) would preempt any State law it would simply have provided that the authority conferred by the section was "exclusive and plenary" without qualification.[5]

On the contrary, the section provides that carriers shall be relieved from the operation of State law only "insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission." Obviously, if it was intended that the Federal law, or any action taken by the ICC pursuant thereto, was to preempt State law, there was no need to insert the quoted language.

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[4]On the other hand, it should be noted that section 1 of the joint resolution refers to "the procedures and provisions of section 5." To interpret the resolution as incorporating only the procedures of section 5 ignores the words "and provisions" and is contrary to the well-settled rule of statutory construction that effect must be given, if possible, to every word, clause, and sentence of a statute. Sutherland, Statutes and Statutory Construction § 4705 (2d ed. 1943).

[5]In rejecting the argument in the *Norwood* case, *supra*, that Congress had preempted this field fram [sic] State regulation by the enactment of the Interstate Commerce Act, the Court stated:

"In the absence of a clearly expressed purpose so to do Congress will not be held to have intended to prevent the exertion of the police power of the States for the regulation of the number of men to be employed in such crews."

Since Congress did insert this language in section 5(11) it can only be construed as a desire that ICC orders issued pursuant to section 5 would not preempt State laws automatically. Only "insofar as may be necessary to enable them [the carriers] to carry into effect the transaction so approved or provided for in accordance with the terms and considerations imposed by the Commission" would such a result obtain.

Thus, the Supreme Court has held that section 5(11) "reposes power in the Commission to exempt railroads * * * from State laws which bar them from operating in the State or impose conditions upon such operation" (*Seabord Air Line Railroad Co.* v. *Daniel*, 333 U.S. 118 (1948) ).

The CHAIRMAN. I think it is true, and I have discussed this with some of our own staff, that if guidance is given or some direction to the Interstate Commerce Commission, it could so recognize the various State laws.

Secretary WIRTZ. My understanding is that that is correct, Mr. Chairman.

*At 536-37:*

The CHAIRMAN. You say in freight trains there is an engineer, a fireman, and what kind of brakeman?

Mr. WOLFE [Chairman, National Railway Labor (management) Conference]. The forward brakeman or head brakeman, a member of the train crew.

The CHAIRMAN. In States with full crew laws what is the situation?

Mr. WOLFE. In some States there are more than a conductor and two brakemen as required by statute. This

extra brakeman, the third man, could be in the cab of the diesel or he could be in the caboose.

The CHAIRMAN. In other words, then, to carry out to the full extent the question of Mr. Friedel, in some instances at times you have the engineer, the fireman, and two brakemen in the cab of the engine?

Mr. WOLFE. That is quite possible where there is a full crew requirement or an excess crew requirement.

Mr. FRIEDEL. In the States that have that law, would there be any changes in the States laws as far as full crews are concerned under your agreement?

Mr. WOLFE. I think Mr. Wirtz indicated yesterday that that was not the intention of this resolution.

*At 562:*

Mr. STAGGERS [Representative from West Virginia]. I was interested about the case in California. Would this supersede any of the State laws with respect to full crews and so forth?

Mr. WOLFE. As we understand it, and this understanding is largely the result of our hearing what Secretary Wirtz testified to yesterday, it would not preempt any State full crew laws.

The CHAIRMAN. Would the gentleman yield at that point?

Mr. STAGGERS. Surely.

The CHAIRMAN. In your negotiations and bargaining with the employees your proposals and the counterproposals, at any time was it ever discussed as to whether or not the full crew laws of the various States would be interfered with or superseded or attempted to be modified?

Mr. WOLFE. In our discussions, Mr. Chairman, we did discuss the comments made by the Presidential Commission respecting the statutes that now exist in about 17 States. Pardon me just one second, if you please. The Commission touched on this very briefly, and if I may, Mr. Chairman, I would like to read it into the record.

The CHAIRMAN. Identify what commission you are talking about.

Mr. WOLFE. It is the Presidential Railroad Commission and it appears at page 63 of the Commission's report.

> It is obvious, of course, that the ability of the carriers, whether acting unilaterally or otherwise, to affect changes in crew consists will be limited by applicable State crew consist laws or regulations as long as such laws or regulations continue to exist. As noted above, most of the legislation of this kind was enacted prior to 1920. These laws apparently failed to envision modern railroad operations. We feel that our recommendations with respect to this issue should have nationwide application. We recognize there will be difficulty in applying the rule recommended by us in States where full crew laws have been enacted. How the restriction of those laws may be lifted, however, is a matter which goes beyond our charge.

During the time we were negotiating with the assistance of the Secretary of Labor and the Assistant Secretary of Labor, a settlement of the crew consist issue, and we suggested that the parties agree to jointly seek the passage of legislation which would eliminate and repeal all existing State full-crew laws and crew administrative regulations.

The CHAIRMAN. Was that agreed to?

Mr. WOLFE. It was not; no, sir. But it sounded like a very sound proposition.

*At 569-70:*

Mr. Moss [Representative from California]. Now if that is the case then by the action of this committee we should not seek to confer any degree of finality upon anything achieved as the result of the actions of this committee. That is to continue to be within the scope of collective bargaining; is that correct?

In other words, you are not seeking here, nor does the resolution, any elements of compulsion other than purely interim compulsion while the mechanics of bargaining continue?

Mr. WOLFE. I so understand the resolution.

Mr. Moss. Then this question of full crew laws must of necessity be continued subject to the laws of the States and no preemption expressed in the resolution we take, because if it were we would be granting a right beyond that which would have been achieved by any collective bargaining procedure?

Mr. WOLFE. I don't know, you may be getting beyond my field.

Mr. Moss. I do not think so, Mr. Wolfe. I believe you are a most knowledgeable individual.

Mr. WOLFE. Thank you, sir.

Mr. Moss. And a most competent one. You cannot at the moment conceive of any method whereby you could affect the full crew laws of the 17 States by collective bargaining procedures.

Mr. WOLFE. I agree to that. We cannot negotiate the elimination of a statute irrespective of how intolerable or unjustified it may be.

Mr. Moss. That is right. It is true that some of these statutes have not been dormant as far as any further action

or consideration of them is concerned for the period back in the 1920's as the Presidential Commission report would indicate.

I believe in the case of California that the most recent change of these laws, the full crew laws occurred either in 1962 or 1961 and dealt specifically with one of the issues most basic to the differences of the railroad workers and railroad management.

Mr. WOLFE. I am not familiar with that but I think Mr. Loomis is.

Mr. MOSS. I believe Mr. Loomis is. There was the deletion of the word "steam" and the substitution of the term "diesel."

Mr. LOOMIS [President, Association of American Railroads]. As I understand it, there was written into the act the existing provisions of the agreement between the firemen's organization and the carriers with respect to the manning of diesel locomotives.

I think the language, if I recall correctly, is almost identical, with the language in the collective bargaining agreement.

Mr. MOSS. I am correct, am I not, that this was either in 1962 or 1961?

Mr. LOOMIS. It was recently, at least.

Mr. MOSS. So it has been a matter considered by the legislature of that State within very recent times?

Mr. LOOMIS. I would say certainly within 4 years.

Mr. MOSS. I am not passing at this moment any judgment on the wisdom of the action of the legislature.

Mr. LOOMIS. I understand.

Mr. Moss. But I am trying to bring into prespective [sic] the questions before this committee and what is actually sought and what appears to be sought here is, one, a means to continue operation while the normal processes of collective bargaining work to bring about that finality which I believe both labor and management hope ultimately to achieve.

Mr. WOLFE. Yes, sir.

*At 614:*

The CHAIRMAN. I just wanted to see if we could develop the record here in order that there might be an understanding. There was some discussion yesterday and the day before as to the status of the full crew laws of the various States. Have you had an opportunity to consider the problem, and if so, what effect would it have on full-crew laws, if any?

Mr. WALRATH [Chairman, Interstate Commerce Commission]. We are aware of the question. I would like with your permission to let the general counsel comment on that, Mr. Chairman.

The CHAIRMAN. Very well.

Mr. GINNANE [General Counsel, Interstate Commerce Commission]. The incorporation by section 1 of the bill of the procedures and provisions of section 5 of the Interstate Commerce Act could support an argument that includes the provisions of paragraph 11 of section 5. Paragraph 11 in effect provides that a carrier may carry out a transaction approved by the Commission without regard to the restraints of the antitrust laws and of State and local laws and regulations. It could be argued that if the Commission approves, for example, interim rules changing crew consist, that by virtue of paragraph 1 that would cut across

State crew laws. I understand that the Secretary of Labor has testified here that that was not an intended result.

The CHAIRMAN. That is true.

Mr. GINNANE. If the Congress wants to be doubly certain, for example, that no such legal consequence follows it could be done simply by making clear in section 1, perhaps parenthetically that paragraph 11 is not to apply.

The CHAIRMAN. I appreciate your very frank response, because I think it has sort of been left up in the air as to what the court might do. There has been expression as to what is intended and what some might have thought but I think we also have to provide clarity wherever it is necessary in order that the Commission may have guidance in its effort to carry out the responsibility should it so be directed.

*At 837-38:*

Mr. FRIEDEL [Representative from Maryland]. Now I want to refer to page 3 of your statement. You say, "suggested a campaign to repeal State full crew laws." I do not know if you heard Mr. Walrath speak the other day or heard his testimony when he said there was a doubt that he could supersede the State laws. He suggested that we amend the bill and put in section 5(11), I think, which would definitely bar the ICC from superseding the State laws.

Mr. WAGNER [President, Order of Railway Conductors and Brakemen]. I was not here, Mr. Congressman, and I didn't hear his testimony, although information was conveyed to me that he had left the impression that perhaps the Interstate Commerce Commission could in some way supersede the State full crew laws that were now in effect.

Mr. FRIEDEL. If this Congress worded the bill as mentioned by the Chairman of the ICC, then he could not?

Mr. WAGNER. I wouldn't want to comment on that without having an opportunity to study that particular part.

Mr. FRIEDEL. I think that is something important to know because I do not think the Congress would want to take that right away. I have a few other questions here.

The CHAIRMAN. Before the gentleman leaves, and for my own information, I would like to raise the question: Why is it considered in one jurisdiction necessary to have a different consist of crews from another jurisdiction?

Mr. WAGNER. Mr. Chairman, that is one of the complications that we run into in our work.

As I said in my testimony and in my statement, you have different conditions on different divisions on the same railroad. The men work under different conditions. You have mountainous territory. You have the deserts. You have railroads where there is a lot of curves, especially in switching operations in industrial plants. There are not two that are the same.

For that reason you have the difference in the crew consist. If you were referring to State laws, Mr. Chairman, I believe that could be answered in this manner: that the lawmakers in the various States evidently were convinced, and feel, that a law of that kind is necessary in order to protect the public that we are talking about here today. There are crossings.

The CHAIRMAN. I am compelled to make the statement now, Mr. Wagner, I wish it was the general policy throughout the Government to give greater recognition to the application of the State laws based on what they think is necessary in those areas.

HOUSE OF REPRESENTATIVES REPORT No. 713, 88th Cong., 1st Sess. (August 26, 1963)

*At 14:*

The committee does not intend that any award made under this section may supersede or modify any State law relating to the manning of trains.

II. SENATE COMMITTEE ON COMMERCE

*Hearings on S.J. Res. 102 (Railroad Work Rules Dispute)*, Committee on Commerce, United States Senate, 88th Cong., 1st Sess. (July 23 through August 1, 1963)

*At 400-01:*

Senator THURMOND [Senator from South Carolina]. I believe there are about 17 States that have laws establishing minimum crews for the manning of trains. Is that the correct number; around that?

Mr. WALRATH. I have heard that; I believe that is true.

Senator THURMOND. These laws are based upon the rights of the States to regulate industry in setting up minimum safety standards for the public as well as the employees, especially to protect the public. I wonder, in your opinion, what effect, if any, would a ruling by the ICC in regard to the crew-consist problems have upon those States having laws establishing minimum crews in the manning of trains. In other words, would your rulings preempt the various State laws on this matter?

Mr. WALRATH. Senator Thurmond, I want my general counsel to correct me if I am wrong.

Let me put it this way: I heard that question asked of the Secretary of Labor in the House only yesterday. He said that it had been researched by his legal staff. I am

not aware that we have researched it recently. But his opinion was that the passage of this or any rules that we approve would not affect the operation of State laws.

As I say, Mr. Ginnane, who sits on my right, may want to supplement that answer. I personally have not researched the question. Nor have I checked the research which the Secretary of Labor says was done over there.

Mr. GINNANE. Senator, on page 2 of the bill, section 1, there is the language "in accordance with the procedures and provisions of section 5 of the Interstate Commerce Act."

Paragraph 11 of section 5 generally provides that the carrier may consummate a transaction approved by the Commission without regard to the restrictions of the anti-trust laws and restrictions of State and municipal laws. From that I suppose some part of an argument could be made that where a carrier was authorized to change the crew-manning requirements that that might carry over to set aside the State full-crew laws.

I heard the Secretary of Labor testify yesterday that that was not intended, that they did not intend, by drafting a bill which would authorize the Commission to take only interim action, valid for only 2 years, to brush aside the permanent State full-crew laws.

If it were desired to make that absolutely certain, if that is the desire of Congress it can be done by just a phrase which would exclude paragraph 11 of section 5 of the Interstate Commerce Act.

*At 404:*

Senator LAUSCHE [Senator from Ohio]. Do you know whether the Rifkin recommendation, if it suggested a number of crewmen that were to man an engine or a train, gave consideration to the State laws dealing with that subject?

Mr. WALRATH. I would not know.

Senator LAUSCHE. You would not know?

Mr. WALRATH. No, sir. I would have to check it.

*At 478:*

Mr. DAVIDSON [Grand Chief Engineer, Brotherhood of Locomotive Engineers]. Mr. Chairman, I was just handed a note that I would like to read into the record, if I may.

Senator PASTORE [Senator from Rhode Island; acting Chairman]. All right.

Mr. DAVIDSON. General Counsel for the ICC, at the House hearing today, stated if this bill passes, the Commission would have jurisdiction over States' minimum crew bills.

Senator PASTORE. I don't want to pass any judgment on that. You have read it into the record. I will check that.

Mr. DAVIDSON. You don't have to say. I wanted you to hear it.

*At 629:*

Mr. SCHOENE [General Counsel, Railway Labor (union) Executives' Association]. Aside from the procedural difficulties about which we have apprehension, I am frightened by the all-pervading effect that apparently would be ascribed to orders of the Commission in these proceedings. The joint resolution says that applications shall be handled subject to section 5 and the procedures and provisions of that section. Part of section 5 is paragraph 11 of section 5. When I read it I shudder.

It starts out:

> Plenary nature of authority under this section. The authority conferred by this section shall be exclusive and plenary.

Skipping further down into the paragraph:

> Other carriers and their organizations and their officers and employees and any other persons participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transactions so approved or provided for.

Senator YARBROUGH [Senator from Texas]. Where are you reading from?

Mr. SCHOENE. I am reading from paragraph 11 of section 5 of the Interstate Commerce Act.

Senator YARBROUGH. Thank you. I have it.

Mr. SCHOENE. I certainly visualize that as a bare minimum the carriers will contend that the effect or orders of the Commission authorizing decreases in crew consist—either of enginecrew or traincrew—would operate to overrule full crew laws in those States that have them. Perhaps that explains the alacrity with which the carriers embraced the President's recommendation and endorsed it.

Admittedly, under their proposals, no matter what might be agreed to in settlement, they cannot obtain by collective bargaining any repeal or modification of State full crew laws. According to the information they submitted to us in negotiations, some 20 to 25 percent of the jobs they proposed to take over were in those States.

Perhaps this is the main thing they are looking to, to supersede the laws of the States. But I have no notion whether it stops there. This language is much more extensive.

This says:

> They are relieved from the operation of the anti-trust laws and all other restraints, limitations, and prohibitions of law, Federal, State, or municipal insofar as may be necessary to enable them to carry into effect the transactions so approved.

I have no notion with health or safety laws of the States may be claimed to be superseded by order of the Interstate Commerce Commission. I don't know whether this means superseding the hours of service law, where they claim that new rules that they might get authority to put into effect require keeping people in violation of the hours of service law. This is a completely uncharted but highly dangerous field.

*At 707-08:*

SUPPLEMENTAL REBUTTAL STATEMENT FOR THE CARRIERS IN THE MATTER OF A DISPUTE BETWEEN CERTAIN RAIL CARRIERS AND FIVE RAILWAY LABOR ORGANIZATIONS INVOLVING RULES AND PRACTICES GOVERNING THE USE, COMPENSATION, AND ASSIGNMENTS OF RAILROAD OPERATING EMPLOYEES

The purpose of this supplemental statement for the carriers is to place before your committee various data requested by members of the committee during your oral hearing, to supplement information now before the committee relating to matters in which your members have indicated particular interest, and to evaluate certain contentions of representatives of the organizations to which the carriers have heretofore had no opportunity to reply.

This statement deals with four areas of subject matter, as follows:

1. Job protection benefits offered by the carriers to employees filling redundant positions, maximum numbers

of such employees subject to displacement and financial and other transitional assistance offered to such employees as may be displaced—pages 2 to 6.

. . . .

DISPLACEMENT OF EMPLOYEES

According to the midmonth count of the Interstate Commerce Commission, there are 32,700 firemen employed in freight and yard service by the class I linehaul railroads. It is the position of the carriers that none of these firemen are needed, and that all of the positions that they now fill would eventually be abolished if the recommendations of the Presidential Railroad Commission or of Emergency Board No. 154 were made effective. On the basis of detailed studies made on 9 major railroads, the carriers estimate that there are 18,800 redundant positions now occupied by unneeded road trainmen and yard switchmen. One might suppose from some of the statements presented by the organization before your committee that the carriers propose to "throw all these employees out of work" or "put all of these men out on the street." The facts are these:

1. A study made by the carriers indicates that 25.9 percent of the firemen positions in freight and yard service must be maintained because of the provisions of so-called full-crew laws of the States of Arizona, Arkansas, Indiana, Louisiana, Nebraska, Nevada, New York, North Dakota, Ohio, Oregon, Texas, Washington, and Wisconsin; and that approximately 50 percent of the redundant positions occupied by unneeded trainmen and switchmen are protected by the laws of these States and those of California, Maine, and Mississippi. In these States, even when redundant employees are removed from the working losts [sic] through natural attrition, new unneeded employees must be hired to fill their positions.

. . . .

*Job protection available to redundant firemen, trainmen and switchmen*

| Categories of employees | Midmonth count of employees | | | | |
|---|---|---|---|---|---|
| | Covered by emergency board recommendation | | Positions protected by State laws | Maximum number subject to displacement | |
| | Number | Percent | | Number | Percent |
| (a) Employees with job rights subject only to natural attrition | 39,300 | 76.3 | 14,710 | 0 | 0 |
| (b) Employees with job rights subject only to natural attrition unless the employer makes available a comparable job with earnings guarantees | 6,710 | 13.0 | 1,740 | 0 | 0 |
| (c) Employees who may terminate ther job rights with severance allowances or remain on a seniority list with preferential hiring rights[1] | 2,780 | 5.4 | 720 | 2,060 | 4.0 |
| (d) Employees who may have their employment terminated without transitional benefits[1] | 2,710 | 5.3 | 700 | 2,010 | 3.9 |
| Total | 51,500 | 100.0 | 17,870 | | |

[1]These employees would be eligible for unemployment insurance benefits under the Railroad Unemployment Insurance Act. The Presidential Railroad Commission recommended Washington job protection allowances, retraining assistance and preferred hiring consideration for employees falling into these categories.

## III. House Floor Debate

109 Cong. Rec. at 16122 (August 28, 1963)

Mr. Sisk [Representative from California]. Mr. Speaker, I requested this time to ask a question of the chairman of the Committee on Interstate and Foreign Commerce regarding the provisions of State laws having to do with the full crew laws that are in existence, I understand, in some 17 States, including the State of California.

May I ask this question of the chairman of the committee: Is it his understanding that nothing in this joint resolution is to in any way preempt on behalf of the Federal Government the field affecting State full crew laws? If he may make a comment on this, I would appreciate it.

Mr. HARRIS. Mr. Speaker, will the gentleman yield?

Mr. SISK. I am glad to yield to the gentleman.

Mr. HARRIS. This issue was raised in the course of the hearings before the committee. Questions were asked of the various people representing management and the labor industry and witnesses representing the labor brotherhoods, the employees' representatives, and the Secretary of Labor. It was made rather clear in the course of the hearings that it would in no way affect the provisions of State laws. The committee in executive session discussed the question and concluded that it was not the intent of the committee in any way to affect State laws. On page 14 of the committee report we included, in order that this history might be made, this language:

> The committee does not intend that any award made under this section may supersede or modify any State law relating to the manning of trains.

In a footnote on page 112 of the hearings before the committee on House Joint Resolution 565, the original bill, there is a discussion of the legal basis for State "full crew" laws and a citation to several Supreme Court decisions upholding these laws, such as *Missouri Pacific R.R. Co.* v. *Norwood* (283 U.S. 249).

Therefore, since this bill does not mention the subject of State laws and since, as the committee report shows, we do not intend to affect these laws, I am confident they are not affected by the bill.

I think that is about as clear as we can make it.

Mr. SISK. Mr. Speaker, I appreciate the statement of the distinguished chairman of the Committee on Interstate and Foreign Commerce. Then certainly as I would understand it, of course, it would be the intent of the Congress that we are not preempting the field in which States have legislated in this area.

Mr. Speaker, I thank the distinguished gentleman from Virginia, chairman of the Committee on Rules, for yielding.

Mr. SMITH [Representative from Virginia]. Mr. Speaker, the colloquy between the gentleman from California [Mr. SISK], and the chairman of the Committee on Interstate and Foreign Commerce, the gentleman from Arkansas [Mr. HARRIS], raises a question that has not previously been discussed on the floor of the House. It was discussed in the committee yesterday before the Committee on Rules. I do not like to remain silent in view of the statement that a State law can overcome the constitutional provision which gives exclusive jurisdiction to the Federal Government in matters of interstate commerce. I do not know what precedents may have been found with reference to this question, but of course, in the matter of purely intrastate commerce under our Constitution the State, of course, would have authority, but when it comes to dealing with interstate commerce I think the provisions of the Constitution are such and the decisions of the courts are such that there is no way in which a State can overcome the power of the Federal Government under the interstate commerce clause.

I simply wanted to make my own position clear with reference to that question, for whatever it may be worth.

Mr. EDMONDSON [Representative from Oklahoma]. Mr. Speaker, will the gentleman yield?

Mr. SMITH. I yield to the gentleman from Oklahoma.

Mr. EDMONDSON. I thank the distinguished chairman of the Committee on Rules for yielding to me at this point.

Would this not mean in effect that about the only kind of train operation in which State laws would prevail would be in the switching of cars involving switch engine operations?

Mr. SMITH. Of course, it is just a question of what is or what constitutes interstate commerce. Now, as you know, the decisions of the courts and the actions of the Congress have gone a long way in putting almost everything under interstate commerce.